Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES MARKHAM

PETITIONER

vs.

THE UNITED STATES OF AMERICA

ELAINE L. CHAO, as Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR,
JANE DOE, JOHN DOE 2 TO 10, DOE PARTNERSHIP
1 TO 10, and DOE ENTITY 1 TO 10,

RESPONDENTS

On Petition For A Writ Certiorari
To The Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

STEPHEN M. SHAW
P.O. BOX 2353
HONOLULU, HAWAII 96804
(808) 521-0800 (Telephone)
(808) 531-2129 (Facsimile)

Attorney for Petitioner
JAMES MARKHAM

QUESTIONS PRESENTED FOR REVIEW

I. Whether the question of the Ninth Circuit's ad hoc doctrine of "transitory denial" of constitutional rights; here, to notices tailored to the capacities and circumstances of Petitioner, is an important question of Federal law which should be settled by this Court?

II. Whether creation of the defense of transitory denial, for executive agencies, on the facts at Bench, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power?

III. Whether the Ninth Circuit and the District Court condoned future violations, by a persistent constitutional violator, of a putative class' rights under the Due Process Clause of the Fifth Amendment To The United States Constitution?

IV. Whether this Court should judicially notice that Respondent OWCP is a persistent and long-term violator of the Constitution? Cf. Kendall v. Brock 689 F. Supp. 354, 368 (D. Vt. 1987)

PARTIES TO THE PROCEEDING

All parties appear in the caption of this case, on the cover page.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING i

TABLE OF AUTHORITIES ..... ii-iv

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT 3-9

CONCLUSION 9

APPENDICES

TABLE OF AUTHORITIES

Page

CONSTITUTION

Fifth Amendment, U.S. Constitution 1, 2, 8

CASES

Butland v. Bowen
673 F. Supp. 638, 641 (D.C. MA 1987) 7

TABLE OF AUTHORITIES

Page

CASES

Covington v. DHHS
750 F.2d 937, 942 (U.S. App. 1984) 3, 7

Dealy v. Heckler
616 F. Supp. 880, 886, (D.C.N.Y. 1984) 7

FTC v. Affordable Media
179 F.3d 1228, 1237 (9th Cir. 1999) 4

Goldberg v. Kelly
397 U.S. 254, 268, 269 90 S. Ct. 1011 (1970) 4, 8

Gonzalez v. Sullivan
914 F.2d 1197, 1203 (9th Cir. 1990) 5, 7, 8, 9

Jacobus v. Alaska
338 F.3d 1095, 1103 (9th Cir. 2003) 4

Kendall v. Brock
689 F. Supp. at 368 2

Memphis Light, Gas & Water Div. V. Craft
436 U.S. 1, 14-15 98 S. Ct. 1554 (1978) 5, 8

Mullane v. Central Hanover Bank & Trust Co.
339 U.S. 306, 314, 70 S. Ct. 652 (1950) 6

Nationwide Mut. Ins. Co. v. Monroe
75 A.D. 2d 765, 427 NY 2d 822, 824
(N.Y. Appn. 1980) 8

TABLE OF AUTHORITIES

Page

CASES

Padilla v. Lever
429 F.3d 910, 914 (9th Cir. 2005) 4

Raditch v. U.S.
929 F.2d 478, 480 (9th Cir. 1991) 8

Rodrigues v. Donovan
769 F.2d 1344, 1349 (9th Cir. 1985) 2

STATUES

28 USC 1254 1

RULES

10(a) Supreme Court Rules 1

20 CFR 10.519 ..... 2, 5

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the decisions below:

The Opinion By The Ninth Circuit Court Of Appeals filed 1-17-06, appears at Appendix A.1-A.12 to this Petition, and is published at Markham v. United States 434 F.3d 1185 (9th Cir. 2006).

BASIS FOR JURISDICTION

The date on which the United States Court of Appeals For The Ninth Circuit decided this case was January 17, 2006 Appen A.1. A petition for rehearing and for en banc review was filed on March 2, 2006, and denied 3-28-06. The mandate was issued 4-5-06. Appn. A.23, A.24

The jurisdiction of this Court is invoked under 28 USC 1254(1), or Rule 10(a) of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. Emphasis added.

Other Provisions Appended Hereto

Code Of Federal Regulations 20 CFR 10.519. Appn. A.13-A.15.

STATEMENT OF THE CASE

Jurisdiction in the court of first instance was grounded on the exception to 5 USC 8149, for constitutional challenges. Rodrigues v. Donovan 769 F.2d 1344, 1349 (9th Cir. 1985).

Like Kendall v. Brock supra 689 F. Supp. at 368, this is a class action. Petitioner was injured on the job as an electrician at Pearl Harbor Naval Shipyard on 4-1-03. Appn. A.6, A.16. He was approved for worker's compensation benefits by Respondent's OWCP and the Secretary of Labor. A.16-A.20. The district court refused jurisdiction on prospective declaratory/injunctive relief claims, and a panel of the Ninth Circuit affirmed, deciding that a notice of benefit loss, or reduction, sent to Petitioner did not violate the due process clause of U.S. Const. Amend. V. (Appn. A.9, A.12.); or, if there

was a "transitory denial" Petitioner's claim was wholly insubstantial. A.9.

The Ninth Circuit ignored the material qualifying assertion in OWCP's notice which said: "If you do comply, compensation will be resumed, except for the period you were not cooperating." Appn. A.18. Emphasis added. This published decision will have broad and unconstitutional impact. A defense of "transitory denial" will have far-reaching adverse effects on constitutional jurisprudence. Appn. A.9 ¶ 2 and A.18.

ARGUMENT

I. Ninth Circuit's Newly Minted Defense Of "Transitory Denial" Of Constitutional Rights Is An Outrageous Departure From Accepted And Usual Judicial Proceedings Which Invokes This Court's Supervisory Power

The Ninth Circuit has so far departed from the Constitution, and sanctioned similar departure by the Hawaii District Court, that this Court must exercise its supervisory power. Additionally, the decision conflicts with precedent from another circuit, Covington v. DHHS 750 F.2d 937, 942 (U.S. App 1984). The Panel's outlandish appraisal of a defective notice provided by Respondent was: "the plain language of the letter provides notice only of a potential reduction of benefits." Appn. A.9 ¶ 1. Emphasis added. In an unanticipated and unusual rationalization for its appraisal of federalese, the Ninth Circuit created a whole new defense for constitutional violations when,

for a variety of reasons, offenders restore the property taken, or refrain from further deprivation. The decision's novel, unanticipated, and injurious doctrine of "transitory denial" (Appn. A.9 ¶ 2) is not found in either the LEXIS caselaw, or CFR libraries.

The impact of this "defense" in cases to enjoin or declare government malfeasance (Appn. A.9, headnote [5]) unconstitutional is of exceptional importance. If upheld by this Court, or certiorari is denied, this decision authorizes and condones constitutional violations in countless other contexts, and provides a new and safe refuge for persistent violators. The decision's new rule of constitutional law directly conflicts with the Ninth Circuit's own doctrine that voluntary cessation of challenged conduct does not moot a case. FTC v. Affordable Media 179 F.3d 1228, 1237 (9th Cir. 1999); Jacobus v. Alaska 338 F.3d 1095, 1103 (9th Cir 2003). See also Padilla v. Lever 429 F.3d 910, 914 (9th Cir 2005).

A. By Departing From Accepted And Usual Constitutional Requirements, The Decision Allows Wide Disparity In Crafting Agency Notices Among The Circuits

Threatened deprivation notices of agencies, including Respondents' at A.16-A.20, are mandated by this Court to be "tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly 397 U.S. 254, 268, 269 90 S. Ct. 1011 (1970). The Ninth Circuit so far departed from Goldberg that agency notices not sent to attorneys will often be misleading and void. Here, Markham had no legal training. Appn.

A.6. The circuit panel, however, had no trouble misconstruing the notice as unambiguous and written in "plain language." Appn. A.9 ¶ 1. But the document (A.16-A.20) could not constitutionally be tailored just for federal judges. See Memphis Light, Gas & Water Div. v. Craft 436 U.S. 1, 14-15 98 S. Ct. 1554 (1978) (ruling that "skeletal" notice was constitutionally insufficient because utility customers are "of various levels of education, experience and resources.")

B. Ninth Circuit Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

This published decision now authorizes Respondent OWCP, and other agencies, to mislead and confuse injured workers nationwide, by adding material, qualifying terms to the CFR. Appn. A.13-A.15. Included in those excesses will be those found at Appn. A.18 (OWCP's notice) which are not found in the CFR or the panel's decision: "(i)f you do comply, compensation will be resumed except for the period when you were not cooperating." Compare Appn. A.9 with Appn. A.18. Emphasis added.

Since it was far from clear from the notice (Appn. A.19-A.22) whether Markham was being docked for some benefits and asked to either cooperate in the future, or to show cause why he shouldn't, the decision conflicted with the Ninth Circuit's own caselaw, which flatly prohibits notices relating to disability decisions from being misleading. Gonzalez v. Sullivan 914 F.2d 1197, 1203 (9th Cir. 1990).

The Ninth Circuit improperly rewrote the CFR; which, until this decision, controlled OWCP's notices to allegedly noncompliant workers in each circuit. Appn. A.16-A.20. The second page of OWCP's notice is also ambiguous (A. 19 ¶ (last)) in that it gave Petitioner Markham thirty days to provide evidence and argument "for not cooperating in this effort." Fairly read, if Mr. Markham did not want to participate in the OWCP's future efforts, he could argue the matter within thirty days. Id. That would still not resolve the lack of appellate rights to challenge accumulated nonpayments for past, vaguely referenced infractions ("except for the period for when you were not cooperating"). Appn. 18.

In the accepted and usual course of judicial proceedings, this notice (Appn. A.16-A.20) in its entirety, was required to be consistent with what the circuit panel reasoned was the OWCP's message. In other words, as a matter of constitutional law, "(t)he notice must be of such nature as reasonably to convey the required information." Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306, 314, 70 S. Ct. 652 (1950). Emphasis added. That information was at least what the panel identified; as well as the information required in CFR 10.519 (Appn. A.13-A.15) (cited in the decision, Appn. A.8 ¶ 1).

By drastically departing from the notice required by the CFR, the Ninth Circuit condoned Respondent's conduct of misleading Petitioner and others so situated into thinking that, along with a potential reduction, if they did not comply (Appn. A.9 ¶ 1), that the OWCP had already taken benefits due for a vaguely referenced

period when injured workers had not cooperated. Appn. A.18.

Adequate notice requires accuracy in the description of legal rights and options available to the parties. Gonzalez supra; Dealy v. Heckler 616 F. Supp. 880, 886, 887 (D.C.N.Y. 1984) (misleading language in a notice is more offensive in a notice than complex or confusing language). As to the benefits not reinstated for a period of noncooperation, due process commands adequate, nonmisleading language in the notice and an opportunity to respond. Appn. A.18.

Complex or confusing language may be found in the CFR section, upon which the notice was based. Appn. A.13-A.15. But telling Petitioner his benefits were not reduced except for period be did not cooperate with OWCP was additionally misleading; and, for the Ninth Circuit and the district court to characterize a classwide violation as insubstantial (Appn. A.12) was not normal or usual in the course of judicial proceedings.

The Ninth Circuit conflicted with Covington v. DHHS supra 750 F2d at 942, in that agencies have affirmative duties to avoid providing applicants with misleading information. Butland v. Bowen 673 F. Supp 638, 641 (D.C. MA 1987).

The decision (Appn. A.1-A.12) allows OWCP to continue to give misleading notice to injured workers that more deprivation will take place "(I)f current non cooperation continues." This phrase severed a calculable benefit amount, based on past acts by Petitioner, from potential future benefit losses for future acts. By

condoning this "notice" (Appn. A.10) the panel conflicted with its own circuit precedent Raditch v. U.S. 929 F.2d 478, 480 (9th Cir. 1991).

While phrases from the notice, seized upon by circuit Justice McKeown, seem internally consistent, they are far removed from their context. Compare Appn. A.9 with Appn. A.18. Taken as a whole, this badly injured electrician, unschooled in federalese, would easily conclude that there were two separate but related actions described in the Respondent's notice at Appn. A.16 and A.18. First, there were potentional benefits which could be interrupted for noncompliance in the future. Appn. A.16 (found by the decision, Appn. A.9); and second, there were actual benefits withheld by Respondent OWCP for periods of noncooperation in the past. Appn. A.18. The latter fact was deliberately left out of the decision (Appn. A.9 headnote [4]), and depa. :d from accepted judicial proceedings.

Had the Panel not overlooked the totality of the language involved, it would have found it misleading to Mr. Markham. A misleading statement "is not notice and is a nullity: Nationwide Mut. Ins. Co. v. Monroe 75 A.D. 2d 765, 427 NY 2d 822, 824 (N.Y. App. 1980). The due process clause prohibits unintelligible, confusing, or misleading notices. Goldberg v. Kelly supra 397 U.S. 254. Memphis Light, Gas & Water Div v. Craft supra 436 U.S. at, 14-15 n 15. Gonzalez at 1203 v. Sullivan supra 914 F.2d at 1203 ("One of the fundamental requirements of procedural due process is that a notice must be reasonably calculated to afford parties their right to present objections.").

Gonzalez both prohibits the disclarity of the notice, (Appn. A.18) and the lack of notice about how Mr. Markham might appeal the benefits reduction for the period of noncooperation; or, whether finality would be accorded to a decision by Markham not to cooperate in the future. Compare Gonzalez 914 F.2d at 1203. A.19.

CONCLUSION

The Petition should be granted.

Dated: Honolulu, Hawaii,

Respectfully Submitted,

STEPHEN M. SHAW
P.O. Box 2353
Honolulu, Hawaii 96804
Tel: (808) 521-0800
Fax: (808) 531-2129

Attorney for Petitioner
JAMES MARKHAM

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES MARKHAM, and as to the third claim, on behalf of others similarly situated,	
Plaintiff-Appellant,	No. 04-15616
	D.C. No.
v.	CV-03-00257-SOM
	OPINION
UNITED STATES OF AMERICA; ELAINE CHAO, as Secretary of Labor; U.S. DEPARTMENT OF LABOR; JANE DOE; 2-10; DOE PARTNERSHIPS 1-10; DOE ENTITIES 1-10; MELANIE GALEN; TWO UNKNOWN OWCP CLAIMS EXAMINERS; TWO UNKNOWN OWCP Nurses,	
Defendant-Appellees.	

Appeal from the United States District Court
for the District of Hawaii
Susan Oki Mollway, District Judge, Presiding

Submitted November 22, 2005*
Honolulu, Hawaii

Filed January 17, 2006

Before: Michael Daly Hawkins, M. Margaret McKeown, and Richard R. Clifton, Circuit Judges.

Opinion by Judge McKeown

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*This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

SUMMARY

Labor and Employment/Workers Compensation

The court of appeals affirmed a judgment of the district court. The court held that a plaintiff's

Federal Employee's Compensation Act (FECA) claims that he was denied due process through a "campaign of terror" that resulted in a threat to reduce compensation benefits without notice were wholly insubstantial, rendering the district court without subject matter jurisdiction.

After complying with a letter warning him that reduction in compensation benefits would continue until he complied in good faith with Office of Workers' Compensation Programs of the United States Department of Labor's (OWCP's) vocational rehabilitation efforts, appellant James Markham filed suit in district court in Hawaii against appellees including the Department of Labor and OWCP. Markham alleged that he was denied due process through OWCP's "campaign of terror," which resulted in a threat to reduce compensation benefits without adequate pre-deprivation notice or a meaningful opportunity to be heard. Markham also alleged a litany of due process violations in various other OWCP administrative practices and customer service facilities. The district court dismissed Markham's complaint for lack of subject matter jurisdiction under 5 U.S.C. § 8128(b), stating that Markham raised wholly insubstantial constitutional challenges.

Markham appealed.

[1] FECA establishes a comprehensive and exclusive worker's compensation scheme for federal employees. The Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. **[2]** Section 8128(b) explicitly provides that the courts do not have

jurisdiction to review FECA claims challenging the merits of benefit determinations. **[3]** Courts retain jurisdiction to consider constitutional challenges or claims for violation of a clear statutory mandate or prohibition. **[4]** The plain language of the letter provided notice only of a potential reduction of benefits if Markham did not comply with the unambiguous instructions of the letter. The letter was in fact notice of the intended action in the event Markham did not cooperate. Although Markham was never denied benefits, any such challenge was precluded by § 8128(b).

[5] Even assuming there was a transitory denial of benefits for the period of non-cooperation, Markham did not claim he was entitled to any specific benefits during this gap. And any potentially imprudent denial of benefits

was corrected when Markham complied with OWCP's rehabilitation requirements. A cognizable due process claim must be more than an ephemeral and insubstantial denial of benefits to which a plaintiff does not claim entitlement. **[6]** Nor did the district court have jurisdiction under § 8128(b) to review Markham's remaining laundry list of due process claims. **[7]** Pure policy decisions concerning the administration of FECA are entirely within the discretion of the Secretary of Labor. **[8]** Mark-ham's purported constitutional claims were wholly insubstantial, rendering the federal courts without subject matter jurisdiction. The judgment of the district court had to be affirmed.

COUNSEL

Stephen M. Shaw, Honolulu, Hawaii, for the appellant.

Edward H. Kubo, Jr., United States Attorney, and Thomas A. Helper, Assistant United States Attorney, United States Department of Justice, District of Hawaii, Honolulu, Hawaii, for the appellees.

OPINION

McKEOWN, Circuit Judge:

In this appeal we consider whether the district court lacked subject matter jurisdiction over James Markham's complaint alleging constitutional violations in the handling of his injury claim by the Office of Workers' Compensation Programs of the United States Department of Labor ("OWCP"). Markham launches a broad indictment against various policies of the agency, labeling its practices a "campaign of terror." Rhetoric cannot, however, transform an unreviewable administrative practice into a constitutional violation. This case presents a clear example of a litigant making wholly insubstantial constitutional allegations to frame otherwise unreviewable administrative decisions. We affirm the district court's dismissal of Markham's complaint.

BACKGROUND

Markham filed a Federal Employee's Compensation Act ("FECA") claim after he was

injured while serving as an electrician with the U.S. Department of the Navy. OWCP accepted Markham's claim and authorized continued compensation and medical benefits. A few weeks later, OWCP notified Markham that he, was required to undergo vocational rehabilitation at the direction of OWCP, absent a good reason for not doing so.[1] The letter advised that a nurse had left Markham numerous unreturned voice mail messages trying to set up a time and place to meet and discuss his vocational rehabilitation. The letter warned Markham that if he continued to not cooperate with the nurse without good cause, OWCP would reduce his, compensation benefits to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.[2] In conclu-

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[1]Under 5 U.S.C. § 8104, OWCP has the discretion to direct an employee making a FECA claim to undergo vocational rehabilitation. [2]Section 8113(b) provides:

If an individual without good cause fails to apply for and undergo

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sion, Markham was warned that a reduction in

compensation benefits would continue until he complied in good faith with OWCP's vocational rehabilitation efforts.

The letter had its intended effect. Shortly after receiving it, Markham cooperated with the nurse and OWCP and began receiving benefits. OWCP informed him that it would not take action or reduce his benefits for his initial non.-cooperation. Markham concedes that he has received all benefits owed him.

Taking great offense to the threat of reduced benefits, Markham filed suit against the Department of Labor, the Secretary of Labor ("Secretary"), OWCP, and various individuals within OWCP. Markham alleged that he was denied due process through OWCP's "campaign of terror," which resulted in a threat to reduce compensation benefits without adequate pre-deprivation notice or a meaningful opportunity to be heard.

Markham also alleged a litany of due process violations in various other OWCP administrative practices and customer service facilities. For example, Markham claimed that OWCP violates the Constitution by: failing to maintain a claims office in his home state of Hawaii; requiring that beneficiaries participate in telephone conferences with multiple parties in different time zones; using a Kentucky address and San Fran-

vocational rehabilitation when so directed under section 8104 of this title, the Secretary [of Labor], on review under section 8128 of this title and after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.

Sections 10.519(b) and (c) are similar in scope.

(1) final and conclusive for all purposes and with . respect to all questions of law and fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. § 8128(b); *see Staacke v. United States Sec'y of Labor*, 841 F.2d 278, 281 (9th Cir. 1988).

[3] The courts have fashioned two narrow exceptions to this absolute jurisdictional bar. Courts retain jurisdiction to consider constitutional challenges or claims for violation of a clear statutory mandate or prohibition. *Staacke,* 841 F.2d' at 281; *see Rodrigues v. Donovan,* 769 F.2d 1344, 1347-48 (9th Cir. 1985).

[4] Markham's first claim is that his benefits were denied without notice, at least as to the period of his non-cooperation. Besides his own declaration, the only thing that Markham cites to support this allegation is the OWCP non-cooperation letter. This letter does not help Markham, however, because the plain language of the letter provides notice only of a *potential* reduction of benefits *if* Markham did not comply with the unambiguous instructions of the letter. The letter was in fact notice of the intended action in the event Markham did not cooperate. Although Markham was never denied benefits, any such challenge is precluded by § 8128(b).

[5] Recognizing this bar, Markham tries to transform a garden-variety administrative action into a case of constitutional magnitude. Even assuming there was a transitory denial of benefits for the period of non-cooperation, Markham does not claim he was entitled to any

specific benefits during this gap of less than two weeks. And any potentially imprudent denial of benefits was corrected when Markham complied with OWCP's rehabilitation requirements. A cognizable due process claim must be more than an ephemeral and insubstan-

tial denial of benefits to which a plaintiff does not claim entitlement. *See Czerkies v. U.S. Dept. of Labor*, 73 F.3d 1435, 1443 (7th Cir. 1996) (en banc) ("The government does not violate the Constitution every time it mistakenly denies a claim for benefits.... This is a case of a claim for benefits `cloaked in constitutional terms.' Czerkies has affixed the constitutional label to a garden-variety claim for benefits plainly barred by 5 U.S.C. § 8128(b)."); *Raditch v. United States*, 929 F.2d 478, 481 (9th Cir. 1991) ("A violation of procedural rights requires only a procedural correction, not the reinstatement of a substantive right to which the claimant may not be entitled on the merits.")

[6] Nor did the district court have jurisdiction under § 8128(b) to review Markham's remaining laundry list of due process claims. FECA vests the Secretary (and hence OWCP) with the

authority to "administer, and decide all questions arising under, [FECA]." 5 U.S.C. § 8145. As such, the Secretary's discretion to make policy choices under FECA is "virtually limitless." *Staacke*, 841 F.2d at 282.

[7] Despite being expressed in constitutional terms, Markham's challenges to the administration of FECA claims involve questions of claims processing and customer service, not questions of due process. His effort to hitch these alleged inadequacies to a constitutional star is unavailing. Pure policy decisions concerning the administration of FECA are entirely within the discretion of the Secretary. Although in certain instances an administrative procedure can give rise to a due process violation, *see Rodrigues*, 769 F.2d at 1348, it is the due process violation and not the administrative procedure that forms a basis for jurisdiction.

Nor can these claims be saved by Markham's complaint that even if the last notice of potential termination never came to fruition, as a consequence of OWCP policies and procedures, he is constantly at risk for a future termination. Apart from the rank speculation inherent in this argument, Markham

has suffered no injury. "[T]he `injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

To be sure, it can be frustrating to penetrate a telephone system where the customer is relegated to voice mail. From Markham's standpoint, in a perfect world, he would be able to meet with nurses at a local office in Hawaii. But these purported inconveniences, which he labels a "campaign of terror" and a "modern system of slavery," do not even remotely rise to the level of cognizable constitutional claims.

[8] Markham's alleged constitutional violations are simply a disagreement with the Secretary's administrative structure and claims process.

Sprinkling the brief with multiple due process references and affixing a constitutional label does not change the essence of the claims. Markham's purported constitutional claims are wholly insubstantial, rendering the federal courts without subject matter jurisdiction.

AFFIRMED.

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*** THIS SECTION IS CURRENT THROUGH THE MAY 8, 2003 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 20 -- EMPLOYEES' BENEFITS
CHAPTER I -- OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR
SUBCHAPTER B -- FEDERAL EMPLOYEES' COMPENSATION ACT
PART 10 - CLAIMS FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT, AS AMENDED
SUBPART F -- CONTINUING BENEFITS
RETURN TO WORK -- EMPLOYER'S RESPONSIBILITIES

20 CFR 10.519

@ 10.519 What action will OWCP take if an employee refuses to undergo vocational rehabilitation?

Under 5 U.S.C.' 8104(a), OWCP may direct a permanently disabled employee to undergo vocational rehabilitation. To ensure that vocational rehabilitation services are available to

all who might be entitled to benefit from them, an injured employee who has a loss of wage-earning capacity shall be presumed to be "permanently disabled," for purposes of this section only, unless and until the employee proves that the disability is not permanent. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, OWCP will act as follows:

(a) Where a suitable job has been identified, OWCP will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. OWCP will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the OWCP nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.

(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meetings with the OWCP nurse, interviews, testing, counseling, functional capacity evaluations, and work

evaluations), OWCP cannot determine what would have been the employee's wage-earning capacity.

(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and OWCP will reduce the employee's monetary compensation accordingly (that is, to zero). This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.

File Number: 132076177
CA1658-D-AL

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS
ADMINISTRATION
OFFICE OF WORKERS'
COMPENSATION PROGRAMS
PO BOX 8300 DISTRICT 13
LONDON KY 40742-8300
Phone: (415) 848-6700

May 15, 2003

Date of Injury: 04/01/2003
Employee: James Markham

JAMES MARKHAM
655 PALAWKI ST.
KAILUA, HI 96734

Dear Mr. Markham:

A registered Nurse has attempted to contact you in relation to your claim under the Federal Employees' Compensation Act. The main purpose of this contact is to assist you in returning to gainful employment. Nurse services include (but are not limited to) important steps toward reemployment such as work evaluations,

coordination of medical efforts, and facilitation of efforts between you and your employer. Your refusal without good cause to meet with the nurse and assist in these efforts may be seen as refusal to undergo vocational rehabilitation.

The following specific circumstances support a finding that you are refusing to cooperate with the nurse intervention, and by association, the vocational rehabilitation efforts of the Office of Workers' Compensation Programs (OWCP):

The field nurse left you voicemail messages on 05/06/2003, 05/07/2003 and 05/08/2003 in an attempt to set up a meeting time, date and place but you did not return any of her calls.

PROVISIONS OF THE LAW AND REGULATIONS

The Federal Employees' Compensation Act (FECA) at Section 5 U.S.C. 8104(a) and 8113(b) states that a claimant mu undergo vocational rehabilitation when OWCr so directs, unless there is a good reason not to do so. Section 5 U.S.C. 8113(b) and the Code of Federal Regulations at 20 CFR 10. 519 describes what action OWCP will take if a claimant refuses to undergo vocational rehabilitation. You are required to cooperate with the assigned nurse until the completion of the rehabilitation process.

If your current non-cooperation continues, OWCP will reduce your compensation. Unless you produce evidence to the contrary, we will assume that the provision of nurse services would have resulted in return to work with no loss of wage earning capacity, and your compensation will be reduced to zero. This reduction will continue until you comply in good faith with OWCP's directions concerning nurse services. If you do comply, compensation will be resumed, except for the period when you were not cooperating.

DEPARTMENT OF THE NAVY
ATTN: HRO-COMP OFC
PEARL HARBOR NAV. SHPYD AND IMF
667 SAFEGUARD ST STE 100
PEARL HARBOR, HI 96860

Should your compensation be reduced to zero under the provisions of 5 U.S.C. 8113(b) and 20 CFR 10.519, any deductions OWCP is making for health benefits (HB) and/or optional life insurance (OLI) will cease and coverage will be terminated. If compensation is resumed, OWCP will reinstate HB and OLI coverage and deduct any past due premiums from continuing compensation.

REQUIREMENTS FOR RESPONSE

If you wish to cooperate, please immediately contact Jamie Neal at (808) 254-3477.

If you believe you have good reason for not cooperating in this effort, advise this office in writing of your reasons, and provide evidence and argument in support of your position. You have 30 days from the date of this letter to respond. Also, if you believe that nursing services would not have reduced your wage earning capacity to zero, submit evidence to support your position.

WARNING

If you do not comply with the instructions

contained in this letter within 30 days, we will end the rehabilitation effort and reduce your compensation under the provisions of Section 8113(b) and Section 20CFR 10.519 as described above.

If you have any questions, please contact this office. using the address or telephone number shown on the previous page.

Sincerely,

C. Melanie Galán
Claims Examiner

ORIGINAL
DOCKETED

FILED
MAR 28, 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES MARKHAM, and as to the third claim, on behalf of others similarly situated,	)	No. 04-15616
	)	D.C. No. CV-03-00257-SOM
	)	District of Hawaii, Honolulu
Plaintiff - Appellant,	)	
v.	)	
	)	ORDER
UNITED STATES OF AMERICA; ELAINE CHAO, as Secretary of Labor; U.S. DEPARTMENT OF LABOR; JANE DOE; JOHN DOE, 2-10; DOE	)	

PARTNERSHIPS 1-10;)
DOE ENTITIES 1-10;)
MELANIE GALEN;)
TWO UNKNOWN OWCP)
CLAIMS. EXAMINERS;)
TWO UNKNOWN OWCP)
NURSES,)
)
Defendant - Appellees.)
_____)

Before: HAWKINS, McKEOWN, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are denied.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Cathy A. Catterson
Clerk of Court

(415) 556-9800

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
Post Office Box 193939
San Francisco, California 94119-3939

April 5, 2006

USDC, Hawaii
District of Hawaii (Honolulu)
United States Courthouse
Honolulu, HI 96850

No.	Title	Agency/D.C. No.
04-15616	Markham v. USA	CV-03-00257-SOM

Dear Clerk:

The following document in the above listed cause is being sent to you under cover of this letter.

- *Certified copy of the Decree of the Court*

The record on appeal will follow under separate cover. Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson
Clerk of Court

s/_____
By: Mariam Foreman
Deputy Clerk

Enclosure(s)
cc. All Counsel

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES MARKHAM, and as to the third claim, on behalf of others similarly situated,	)	No. 04-15616
	)	D.C. No. CV-03-00257-SOM
Plaintiff - Appellant,	)	
v.	)	
	)	**JUDGMENT**
UNITED STATES OF AMERICA; et al.,	)	
Defendants - Appellees.	)	

Appeal from the United States District Court for the District of Hawaii (Honolulu).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is
AFFIRMED.

Filed and entered 01/17/06

Supreme Court, U.S.
FILED
06-47. MAY 1 6 2006
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES MARKHAM

PETITIONER

vs.

THE UNITED STATES OF AMERICA

ELAINE L. CHAO, as Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR,
JANE DOE, JOHN DOE 2 TO 10, DOE PARTNERSHIP
1 TO 10, and DOE ENTITY 1 TO 10,

RESPONDENTS

On Petition For A Writ Certiorari
To The Supreme Court of the United States

SUPPLEMENTAL APPENDIX

STEPHEN M. SHAW
P.O. BOX 2353
HONOLULU, HAWAII 96804
(808) 521-0800 (Telephone)
(808) 531-2129 (Facsimile)

Attorney for Petitioner
JAMES MARKHAM

SUPPLEMENTAL APPENDIX
(REPLACING PRIOR APPENDIX IN ITS ENTIRETY)

THIS SUPPLEMENTAL APPENDIX ADDS THE OPINION OF UNITED STATES DISTRICT COURT, DISTRICT OF HAWAII AT I.1 - I.14

A.1 - A.25 ARE ALL FROM THE PREVIOUSLY FILED APPENDIX, AND CORRECT A PRINTING ERROR IN THE NINTH CIRCUIT OPINION, A. 1 - A. 12

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JAMES MARKHAM, and as to the third claim, on behalf of others similarly situated, Plaintiff, v. UNITED STATES OF AMERICA; ELAINE CHAO, as Secretary of Labor; U.S. DEPARTMENT OF LABOR; JANE DOE; 2-10; DOE PARTNERSHIPS 1-10; DOE ENTITIES 1-10; MELANIE GALEN; TWO UNKNOWN OWCP CLAIMS EXAMINERS; TWO UNKNOWN OWCP Nurses, *Defendant-Appellees.*	Civ. No. 03-00257 SOM/KSC ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION.

Plaintiff James Markham alleges that the United

States Department of Labor, Office of Workers' Compensation Programs ("OWCP"), and Melanie Galan, the OWCP claims examiner assigned to Markham's case, violated his constitutional rights in handling his claims for injuries suffered while a federal employee. Markham seeks a declaratory judgment that various OWCP practices are unconstitutional and an injunction against those practices. In addition to asserting his own claim, Markham purports to represent a class that has allegedly been subjected to a similar "campaign of terror" by OWCP. Am. Compl. ¶10.

II. BACKGROUND.

Markham was injured on April 1, 2003, while serving as an electrical worker with the U.S. Department of the Navy. April 23, 2003, OWCP accepted Markham's claim for his work related injuries and authorized continuation of pay and medical benefits. Ex. 2. On May 15, 2003, OWCP notified Markham that a registered nurse had attempted to contact him to set up a meeting and had left him three voicemail messages, none of which had been returned. Ex. 6. OWCP informed Markham that the purpose of the meeting was to assist him in returning to gainful employment and that Markham was required, under the Federal Employees' Compensation Act ("FECA"), to undergo vocational rehabilitation when directed by OWCP. Id. OWCP warned Markham that his FECA benefits would be reduced if he continued his non-cooperation and cited the applicable statutes. Id. See also 5 U.S.C. § 8104(a) (providing that the Secretary

may direct a permanently disabled individual to undergo vocational rehabilitation); §8113(b) (providing that the Secretary may reduce benefits of an individual who without good cause fails to apply for and undergo vocational rehabilitation when directed under § 8104).

After receiving the letter threatening a reduction of benefits for non-compliance, Markham began cooperating with the nurse. As a result of this cooperation, OWCP informed Markham that it would not take punitive action against him for his initial non-cooperation. Ex. 11.

Markham saw Dr. Jason Chang for treatment beginning on May 15, 2003. Chang diagnosed Markham with right shoulder impingement syndrome and cervical strain with radiculopathy, injuries that had not been previously diagnosed or reported to OWCP. On July 30, 2003, OWCP informed Markham and Chang that treatment for these newly diagnosed injuries could not be authorized until Markham provided an explanation of how these injuries were related to his workplace accident. Ex. 15; Ex. C. When Markham provided such information, OWCP authorized treatment for these injuries on August 5, 2003. Ex. 16.

Markham now alleges that his benefits were terminated without a hearing. Am. Compl. ¶12. OWCP vigorously maintains that no termination of benefits ever occurred. Mot. at 1; Exs. 12, 17. The only documentary evidence Markham presents to support his claim of termination is a letter from Galan to Markham's attorney stating that OWCP would not

authorize physical therapy until Markham provided information showing that his injuries were related to his work accident. Am. Compl. ¶19(A);Ex. C.[1] However, upon receiving updated medical information from Markham, OWCP promptly authorized physical

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[1] Markham cited this letter as Ex. B. However, Ex. B is a blank page.

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therapy. Ex. 16. Markham does not specify any other alleged termination of benefits. Moreover, in his litany of relief requested, Markham does not seek the restoration of benefits or any back benefits owed for the period that his benefits were allegedly terminated.[2]

The majority of Markham's complaint focuses on the procedures used and services provided by OWCP. Markham alleges that numerous administrative procedures employed by OWCP violate the constitution. First, he alleges that OWCP violates the constitution by violating Hawaii law in failing to maintain a claims office within the State. Am. Compl. ¶19(B). Furthermore, Markham complains that OWCP uses a Kentucky address, while using a San Francisco phone number, to process his claim. Am. Compl. ¶19(F). Markham alleges that it is "ridiculous" to require him to take part in conference calls, particularly from another time zone, relating to his case, rather than using face-to-face meetings. Am. Compl. ¶15. Markham alleges that OWCP harassed physicians and ruined doctor-patient relationships by refusing to authorize treatment until further

information was obtained. Am. Compl. ¶¶ 14, 15. In sum, Markham alleges that

---

[2] At the hearing, Markham initially claimed that he could not tell if benefits had been reduced or not. Markham then conceded that whether benefits had ever been withheld, full restitution has been made.

OWCP perpetuates "a modern system of slavery" with the manner in which it handles claims. Am. Compl. ¶19(J).

To remedy this `modern system of slavery,' Markham seeks equitable relief on numerous grounds. Markham seeks an injunction preventing OWCP from:

> (a) operating in the District of Hawaii, or in any other District, without a fully staffed claims service office with draft authority other than the area within the borders of the State of Kentucky,
>
> (b) [u]sing answering machines, robots, temps, or unqualified individuals to answer telephone inquiries about claims,

(c) servicing OWCP claims in Hawaii from any location away from the District of Hawaii,

(d) employing, or contracting with individuals who have no physical office mailing address or human telephone receptionist to arrange vocational rehabilitation, or provide "nursing" functions,

(e) using San Francisco, or any other out-of-District telephone numbers to respond to claims inquiries,

(f) referring claimants to their Congressional delegation for claims disputes,

(g) referring claimants to out-of-state claims representatives with a Kentucky address, and a San Francisco telephone.

Am. Compl. at 11. Markham further seeks a declaratory judgment that "all statutes, codes proceedings, practice, and agency common-law authorizing administrative remedies by the OWCP are inadequate unconstitutional and void." Id.

Markham further asserts a Bivens action against Galan, alleging that she violated his constitutional rights by conducting conference calls from another time zone. Am. Compl. ¶30(B). Finally, Markham seeks to represent a class of individuals who have been

subjected to similar OWCP policies that are allegedly unconstitutional.

III. STANDARD OF REVIEW.

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may either attack the allegations of the complaint as insufficient to confer subject matter jurisdiction on the court, or attack the existence of subject matter jurisdiction in fact. Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979). When the motion to dismiss attacks the allegations of the complaint as insufficient, to confer subject matter jurisdiction, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Fed'n of African Amer. Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir. 1996).

When the motion to dismiss is a factual attack on subject matter jurisdiction, however, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the existence of subject matter jurisdiction in fact. Thornhill, 594 F.2d at 733. Accordingly, on a factual attack on subject matter jurisdiction, the court is not restricted to the face of the pleadings, but may review evidence such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. See McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988). Because the party invoking the federal court's jurisdiction has the burden of proving the actual existence of subject matter

jurisdiction, courts have held that the plaintiff must establish jurisdiction with evidence from other sources, such as affidavits or depositions. Trentacosta v. Frontier Pacific Aircraft Industries, Inc., 813 F.2d 1553, 1559 (9th Cir. 1987). This requirement "is the same as that required under Rule 56(e) that the nonmoving party to a motion for summary judgment must set forth specific facts, beyond his pleadings, to show that a genuine issue of material fact exists." Id. Accordingly, affidavits and declarations in opposition to a factual attack on subject matter jurisdiction must be made on personal knowledge and set forth facts that would be admissible in evidence. Fed. R. Civ. P. 56(e).

IV. ANALYSIS.

OWCP contends that this court lacks jurisdiction over Markham's claims. First, viewing the gravamen of Markham's claim as an alleged termination of benefits without notice, OWCP contends that Markham has not suffered an injury in fact because no such termination ever occurred. Mot. at 10. Second, OWCP submits that FECA's statutory scheme precludes review of Markham's claims. Mot. at 12. The court agrees with OWCP's second contention.

FECA establishes a comprehensive and exclusive workers' compensation scheme for federal employees. The Act provides that "the United States will pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty . . ." 5 U.S.C. § 8102(a). The Secretary of Labor has the authority to administer and decide all questions under

FECA., 5 U.S.C. § 8145. The Secretary may formulate rules and regulations necessary to administer the Act. 5 U.S.C. § 8149. OWCP has the discretion to direct an employee to undergo vocational rehabilitation. 5 U.S.C. § 8104. Failure to cooperate may result in suspension of an employee's benefits. 5 U.S.C. § 8113(b).

Congress has foreclosed judicial review of determinations under the FECA. Under 5 U.S.C. § 8128(b):

> The Action of the Secretary or her designee in allowing or denying payment under this subchapter is--
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

The Supreme Court has noted that § 8128(b) is an example of Congress using unambiguous language to preclude judicial review. Lindahl v. Office of Personnel Management, 470 U.S. 768, 780 (1985); Staacke v. United States Dept. of Labor, 841 F.2d 278, 281 (9th Cir. 1988). There are, however, two narrow exceptions to the absolute

foreclosure of judicial review. Courts maintain jurisdiction to consider constitutional challenges and to hear claims that a defendant is violating a clear statutory mandate or prohibition. Staacke, 841 F.2d at 281. Only the first exception is even arguably relevant to the present case.

Markham alleges that OWCP violated his constitutional rights. However, alleging constitutional violations does not automatically confer jurisdiction pursuant to the limited exception to § 8128(b). A "mere allegation of a constitutional violation would not be sufficient to avoid the effect of a finality provision." Rodrigues v. United State Dept. of Labor, 769 F.2d 1344, 1348 (9th Cir. 1985). If an allegation of a constitutional violation is "wholly insubstantial," the court does not have jurisdiction over the claim. Paluca v. Sec. of Labor, 813 F.2d 524, 527 (1st Cir. 1987) (citing Bailey v. Patterson, 369 U.S. 31, 33 (1962)); see also Czerkies v. U.S. Dept. of Labor, 73 F.3d 1435, 1442 (7th Cir. 1996) (affirming dismissal of a claim when the "constitutional claim was insubstantial").

Unless Markham raises an arguably substantial claim that his constitutional rights have been violated, this court does not have jurisdiction. Markham alleges that his benefits were terminated without notice. Defendants contend that no termination ever occurred. The only evidence presented that arguably could be read to demonstrate termination is a letter dated July 24, 2003, stating that physical therapy could not be commenced without further information from Markham. Ex. C.

However, the evidence also demonstrates that physical therapy was approved on August 5, 2003. Ex. 16. Assuming arguendo that the initial denial amounted to a termination of benefits, a dubious proposition, the matter was promptly corrected. As Markham does not even allege that he should have received specific benefits in the gap of a week and a half before that "correction," Markham does not even allege facts constituting that a due process violation. See Raditch v. United States, 929 F.2d 478, 481-2 (9th 1991) (holding that violation of procedural rights requires only a procedural correction, not the reinstatement of the substantive right claimed). Markham received the substantive right he sought, physical therapy, not merely a procedural correction.

Markham also alleges that various administrative procedures used by OWCP violate the constitution. These allegations are insubstantial and do not confer jurisdiction. See Paluca, 813 F.2d at 527; Czerkies, 73 F.3d at 1442. FECA vests the Secretary of Labor with plenary authority to "administer, and decide all questions arising under" the Act. 5 U.S.C. § 8145; Staacke, 841 F.2d at 282. The discretion given to the Secretary to make policy choices associated with disability decisions is "virtually limitless." Staacke, 841 F.2d at 282. Given this virtually limitless authority, the Secretary's decision as to the location of OWCP offices or the decision to use answering machines and teleconferences, for example, cannot be said to be unconstitutional.

Markham co.itends that it violates the constitution for the OWCP to fail to maintain an office in the State of Hawaii. Encompassed within the Secretary's virtually limitless authority is the ability to determine that it is more efficient to handle claims from a centralized office. Markham's reliance on Haw. Rev. Stat. § 386-124.5 is misplaced. Section 386-124.5 requires an insurer to maintain a claims service office within the state. Not only is OWCP not an insurer, Hawaii law does not govern the administration of a federal workers' compensation program. FECA is designed as the exclusive remedy for federal employees injured on the job. Any state law that interfered with the administration of this exclusive remedy would be preempted. See e.g. Saul v. United States, 928 F.2d 829, 841 (9th Cir. 1991).

Markham's other allegations of unconstitutional procedures for which he seeks injunctive relief are similarly unfounded. There is nothing constitutionally impermissible about the OWCP's use of a Kentucky address and a San Francisco phone number, or for that matter any long distance number, to administer claims. Nor is it improper for OWCP to use answering machines. Injured workers and their legal representatives do not have a due process right to Lexis or Westlaw access, teleconference facilities, or local phone numbers to contact claim managers. Markham disapproves of many of the procedures established by OWCP, and argues many facilities and accommodations should be provided as a service to injured workers. However, Markham is not the Secretary of Labor. Markham does not have a

constitutional right to his preferred procedures. It is the Secretary who is vested with authority to establish the procedures used to administer OWCP, and the policy choices made by the Secretary are not an unconstitutional exercise of that authority. Markham's allegation that all of OWCP should be declared unconstitutional is without merit.

Markham's asserted Bivens action against Galan similarly fails. Markham has not stated a claim that Galan has violated any of his constitutional rights. The constitution does not forbid conference calls (even if conducted from another time zone), nor does it prohibit out of district individuals from ruling on a claim for benefits. Assignment of a nurse to help coordinate medical care does not violate any liberty interest that may exist in the physician-patient relationship. Even if Markham had properly alleged that a constitutional violation had occurred, Galan would be entitled to immunity unless it could be shown that she violated clearly established constitutional law. See e.g., Gausvik v. Perez, 345 F.3d 313, 816 (9th Cir. 2003). Markham has failed to allege facts sufficient to support a claim that Galan violated clearly established constitutional law.

Since Markham does not properly allege a Bivens action, he is unable to represent a class of individuals who have supposedly-suffered from similar constitutional violations. Moreover, Markham, alleging only numerosity, has failed to make even a minimal showing that the basic prerequisites for class

certification have been met. See Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1312 (9th Cir. 1977). Furthermore, Markham's counsel has made no record showing that he can adequately represent the class. See Local Joint Executive Bd. Of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1162 (9th Cir. 2001).

V. CONCLUSION.

The motion to dismiss is GRANTED. Section 8102(b) precludes judicial review over FECA decisions except when a movant raises a substantial question of constitutional law. Markham raises wholly insubstantial constitutional challenges and therefore this court grants the motion to dismiss.

DATED: Honolulu, Hawaii, December 22, 2003.

SUSAN OKI MOLLWAY

UNITED STATES DISTRICT JUDGE

Markham v. United States et al., Civ. No. 03-00257 SUN,/KSC; Order Granting Defendants' Motion to Dismiss.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES MARKHAM, and as to the third claim, on behalf of others similarly situated, *Plaintiff-Appellant,*	No. 04-15616
	D.C. No. CV-03-00257-SOM
v.	OPINION
UNITED STATES OF AMERICA; ELAINE CHAO, as Secretary of Labor; U.S. DEPARTMENT OF LABOR; JANE DOE; 2-10; DOE PARTNERSHIPS 1-10; DOE ENTITIES 1-10; MELANIE GALEN; TWO UNKNOWN OWCP CLAIMS EXAMINERS; TWO UNKNOWN OWCP Nurses, *Defendant-Appellees.*	

Appeal from the United States District Court
for the District of Hawaii
Susan Oki Mollway, District Judge, Presiding
Submitted November 22, 2005*
Honolulu, Hawaii
Filed January 17, 2006

Before: Michael Daly Hawkins, M. Margaret McKeown, and Richard R. Clifton, Circuit Judges.

Opinion by Judge McKeown

*This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

SUMMARY

Labor and Employment/Workers Compensation

The court of appeals affirmed a judgment of the district court. The court held that a plaintiff's Federal Employee's Compensation Act (FECA) claims that he was denied due process through a "campaign of terror" that resulted in a threat to reduce compensation benefits without notice were wholly insubstantial, rendering the district court without subject matter jurisdiction.

After complying with a letter warning him that reduction in compensation benefits would continue until he complied in good faith with Office of Workers' Compensation Programs of the United States Department of Labor's (OWCP's) vocational rehabilitation efforts, appellant James Markham filed suit in district court in Hawaii against appellees including the Department of Labor and OWCP. Markham alleged that he was denied

due process through OWCP's "campaign of terror," which resulted in a threat to reduce compensation benefits without adequate pre-deprivation notice or a meaningful opportunity to be heard. Markham also alleged a litany of due process violations in various other OWCP administrative practices and customer service facilities. The district court dismissed Markham's complaint for lack of subject matter jurisdiction under 5 U.S.C. § 8128(b), stating that Markham raised wholly insubstantial constitutional challenges.

Markham appealed.

[1] FECA establishes a comprehensive and exclusive worker's compensation scheme for federal employees. The Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. [2] Section 8128(b) explicitly provides that the courts do not have

jurisdiction to review FECA claims challenging the merits of benefit determinations. [3] Courts retain jurisdiction to consider constitutional challenges or claims for violation of a clear statutory mandate or prohibition. [4] The plain language of the letter provided notice only of a potential reduction of benefits if Markham did not comply with the unambiguous instructions of the letter. The letter was in fact notice of the intended action in the event Markham did not cooperate. Although Markham was never denied benefits, any such challenge was precluded by § 8128(b).

[5] Even assuming there was a transitory denial of benefits for the period of non-cooperation, Markham did not claim he was entitled to any specific benefits during this gap. And any potentially imprudent denial of benefits was corrected when Markham complied with OWCP's rehabilitation requirements. A cognizable due process claim must be more than an ephemeral and insubstantial denial of benefits to which a plaintiff does not claim entitlement. [6] Nor did the district court have jurisdiction under § 8128(b) to review Markham's remaining laundry list of due process claims. [7] Pure policy decisions concerning the administration of FECA are entirely within the discretion of the Secretary of Labor. [8] Mark-ham's purported constitutional claims were wholly insubstantial, rendering the federal courts without subject matter jurisdiction. The judgment of the district court had to be affirmed.

COUNSEL

Stephen M. Shaw, Honolulu, Hawaii, for the appellant.

Edward H. Kubo, Jr., United States Attorney, and Thomas A. Helper, Assistant United States Attorney, United States Department of Justice, District of Hawaii, Honolulu, Hawaii, for the appellees.

OPINION

McKEOWN, Circuit Judge:

In this appeal we consider whether the district court

lacked subject matter jurisdiction over James Markham's complaint alleging constitutional violations in the handling of his injury claim by the Office of Workers' Compensation Programs of the United States Department of Labor ("OWCP"). Markham launches a broad indictment against various policies of the agency, labeling its practices a "campaign of terror." Rhetoric cannot, however, transform an unreviewable administrative practice into a constitutional violation. This case presents a clear example of a litigant making wholly insubstantial constitutional allegations to frame otherwise unreviewable administrative decisions. We affirm the district court's dismissal of Markham's complaint.

BACKGROUND

Markham filed a Federal Employee's Compensation Act ("FECA") claim after he was injured while serving as an electrician with the U.S. Department of the Navy. OWCP accepted Markham's claim and authorized continued compensation and medical benefits. A few weeks later, OWCP notified Markham that he was required to undergo vocational rehabilitation at the direction of OWCP, absent a good reason for not doing so.[1] The letter advised that a nurse had left Markham numerous unreturned voice mail messages trying to set up a time and place to meet and discuss his vocational rehabilitation. The letter warned Markham that if he continued to not cooperate with the nurse without good cause, OWCP would reduce his compensation benefits to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.[2] In conclu-

[1]Under 5 U.S.C. § 8104, OWCP has the discretion to direct an employee making a FECA claim to undergo vocational rehabilitation.

[2]Section 8113(b) provides:

> If an individual without good cause fails to apply for and undergo

sion, Markham was warned that a reduction in compensation benefits would continue until he complied in good faith with OWCP's vocational rehabilitation efforts.

The letter had its intended effect. Shortly after receiving it, Markham cooperated with the nurse and OWCP and began receiving benefits. OWCP informed him that it would not take action or reduce his benefits for his initial non.-cooperation. Markham concedes that he has received all benefits owed him.

Taking great offense to the threat of reduced benefits, Markham filed suit against the Department of Labor, the Secretary of Labor ("Secretary"), OWCP, and various individuals within OWCP. Markham alleged that he was denied due process through OWCP's "campaign of terror," which resulted in a threat to reduce compensation benefits without adequate pre-deprivation notice or a meaningful opportunity to be heard.

Markham also alleged a litany of due process violations in various other OWCP administrative practices and customer service facilities. For example, Markham claimed that OWCP violates the Constitution by: failing to maintain

a claims office in his home state of Hawaii; requiring that beneficiaries participate in telephone conferences with multiple parties in different time zones; using a Kentucky address and San Fran-

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vocational rehabilitation when so directed under section 8104 of this title, the Secretary [of Labor], on review under section 8128 of this title and after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.

Sections 10.519(b) and (c) are similar in scope.

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cisco telephone number for notices and correspondence with beneficiaries in Hawaii; using nurses who lack contact information beyond voice mail; delegating authority to nurses and retaining employees whom he regards as unqualified; and using misleading non-cooperation letters.

To remedy these supposed constitutional violations, Mark-ham seeks an injunction against these practices and a broad declaratory judgment "that all statutes, codes[,] proceedings, practice[s], and agency common-law authorizing administrative remedies by the OWCP are inadequate, unconstitutional and void."

The district court dismissed Markham's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction under 5 U.S.C. § 8128(b),

stating that "Markham raised wholly insubstantial constitutional challenges." We review de novo the district court's dismissal for lack of subject matter jurisdiction. *Federal Deposit Ins. Corp. v. Nichols*, 885 F.2d 633, 635 (9th Cir. 1989).

DISCUSSION

[1] FECA establishes a comprehensive and exclusive workers' compensation scheme for federal employees. The Act provides that "[t]he United States shall pay compensation .. . for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty ...." 5 U.S.C. § 8102(a). The Secretary has the authority to administer and decide all questions under FECA, 5 U.S.C. § 8145, and may formulate rules and regulations necessary to administer the Act, 5 U.S.C. § 8149.

[2] Section 8128(b) explicitly provides that the courts do not have jurisdiction to review FECA claims challenging the merits of benefit determinations:

> The action of the Secretary or his designee in allowing or denying a payment under this subchapter is –
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. § 8128(b); *see Staacke v. United States Sec'y of Labor*, 841 F.2d 278, 281 (9th Cir. 1988).

[3] The courts have fashioned two narrow exceptions to this absolute jurisdictional bar. Courts retain jurisdiction to consider constitutional challenges or claims for violation of a clear statutory mandate or prohibition. *Staacke*, 841 F.2d' at 281; *see Rodrigues v. Donovan*, 769 F.2d 1344, 1347-48 (9th Cir. 1985).

[4] Markham's first claim is that his benefits were denied without notice, at least as to the period of his non-cooperation. Besides his own declaration, the only thing that Markham cites to support this allegation is the OWCP non-cooperation letter. This letter does not help Markham, however, because the plain language of the letter provides notice only of a *potential* reduction of benefits *if* Markham did not comply with the unambiguous instructions of the letter. The letter was in fact notice of the intended action in the event Markham did not cooperate. Although Markham was never denied benefits, any such challenge is precluded by § 8128(b).

[5] Recognizing this bar, Markham tries to transform a garden-variety administrative action into a case of constitutional magnitude. Even assuming there was a transitory denial of benefits for the period of non-cooperation, Markham does not claim he was entitled to any specific benefits during this gap of less than two weeks. And any potentially imprudent denial of benefits was corrected when Markham complied with OWCP's rehabilitation requirements. A cognizable due process claim must be more than an ephemeral and insubstan-

tial denial of benefits to which a plaintiff does not claim entitlement. *See Czerkies v. U.S. Dept. of Labor*, 73 F.3d 1435, 1443 (7th Cir. 1996) (en banc) ("The government does not violate the Constitution every time it mistakenly denies a claim for benefits.... This is a case of a claim for benefits `cloaked in constitutional terms.' Czerkies has affixed the constitutional label to a garden-variety claim for benefits plainly barred by 5 U.S.C. § 8128(b)."); *Raditch v. United States*, 929 F.2d 478, 481 (9th Cir. 1991) ("A violation of procedural rights requires only a procedural correction, not the reinstatement of a substantive right to which the claimant may not be entitled on the merits.")

[6] Nor did the district court have jurisdiction under § 8128(b) to review Markham's remaining laundry list of due process claims. FECA vests the Secretary (and hence OWCP) with the authority to "administer, and decide all questions arising under, [FECA]." 5 U.S.C. § 8145. As such, the Secretary's discretion to make policy choices under FECA is "virtually limitless." *Staacke*, 841 F.2d at 282.

[7] Despite being expressed in constitutional terms, Markham's challenges to the administration of FECA claims involve questions of claims processing and customer service, not questions of due process. His effort to hitch these alleged inadequacies to a constitutional star is unavailing. Pure policy decisions concerning the administration of FECA are entirely within the discretion

of the Secretary. Although in certain instances an administrative procedure can give rise to a due process violation, *see Rodrigues*, 769 F.2d at 1348, it is the due process violation and not the administrative procedure that forms a basis for jurisdiction.

Nor can these claims be saved by Markham's complaint that even if the last notice of potential termination never came to fruition, as a consequence of OWCP policies and procedures, he is constantly at risk for a future termination. Apart from the rank speculation inherent in this argument, Markham

has suffered no injury. "[T]he `injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

To be sure, it can be frustrating to penetrate a telephone system where the customer is relegated to voice mail. From Markham's standpoint, in a perfect world, he would be able to meet with nurses at a local office in Hawaii. But these purported inconveniences, which he labels a "campaign of terror" and a "modern system of slavery," do not even remotely rise to the level of cognizable constitutional claims.

[8] Markham's alleged constitutional violations are simply a disagreement with the Secretary's

administrative structure and claims process. Sprinkling the brief with multiple due process references and affixing a constitutional label does not change the essence of the claims. Markham's purported constitutional claims are wholly insubstantial, rendering the federal courts without subject matter jurisdiction.

AFFIRMED.

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*** THIS SECTION IS CURRENT THROUGH THE MAY 8, 2003 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 20 -- EMPLOYEES' BENEFITS
CHAPTER I -- OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR
SUBCHAPTER B -- FEDERAL EMPLOYEES' COMPENSATION ACT
PART 10 - CLAIMS FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT, AS AMENDED
SUBPART F -- CONTINUING BENEFITS
RETURN TO WORK -- EMPLOYER'S RESPONSIBILITIES

20 CFR 10.519

@ 10.519 What action will OWCP take if an employee refuses to undergo vocational rehabilitation?

Under 5 U.S.C.' 8104(a), OWCP may direct a permanently disabled employee to undergo vocational rehabilitation. To ensure that vocational rehabilitation services are available to

all who might be entitled to benefit from them, an injured employee who has a loss of wage-earning capacity shall be presumed to be "permanently disabled," for purposes of this section only, unless and until the employee proves that the disability is not permanent. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, OWCP will act as follows:

(a) Where a suitable job has been identified, OWCP will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. OWCP will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the OWCP nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.

(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meetings with the OWCP nurse, interviews, testing, counseling, functional capacity evaluations, and work

evaluations), OWCP cannot determine what would have been the employee's wage-earning capacity.

(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and OWCP will reduce the employee's monetary compensation accordingly (that is, to zero). This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.

File Number: 132076177
CA1658-D-AL

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS
ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION
PROGRAMS
PO BOX 8300 DISTRICT 13
LONDON KY 40742-8300
Phone: (415) 848-6700

May 15, 2003

Date of Injury: 04/01/2003
Employee: James Markham

JAMES MARKHAM
655 PALAWKI ST.
KAILUA, HI 96734

Dear Mr. Markham:

A registered Nurse has attempted to contact you in relation to your claim under the Federal Employees' Compensation Act. The main purpose of this contact is to assist you in returning to gainful employment. Nurse services include (but are not limited to) important steps toward reemployment such as work evaluations,

coordination of medical efforts, and facilitation of efforts between you and your employer. Your refusal without good cause to meet with the nurse and assist in these efforts may be seen as refusal to undergo vocational rehabilitation.

The following specific circumstances support a finding that you are refusing to cooperate with the nurse intervention, and by association, the vocational rehabilitation efforts of the Office of Workers' Compensation Programs (OWCP):

The field nurse left you voicemail messages on 05/06/2003, 05/07/2003 and 05/08/2003 in an attempt to set up a meeting time, date and place but you did not return any of her calls.

PROVISIONS OF THE LAW AND REGULATIONS

The Federal Employees' Compensation Act (FECA) at Section 5 U.S.C. 8104(a) and 8113(b) states that a claimant must undergo vocational rehabilitation when OWCP so directs, unless there is a good reason not to do so. Section 5 U.S.C. 8113(b) and the Code of Federal Regulations at 20 CFR 10. 519 describes what action OWCP will take if a claimant refuses to undergo vocational rehabilitation. You are required to cooperate with the assigned nurse until the completion of the rehabilitation process.

If your current non-cooperation continues, OWCP will reduce your compensation. Unless you produce evidence to the contrary, we will assume that the provision of nurse services would have resulted in return to work with no loss of wage earning capacity, and your compensation will be reduced to zero. This reduction will continue until you comply in good faith with OWCP's directions concerning nurse services. If you do comply, compensation will be resumed, except for the period when you were not cooperating.

DEPARTMENT OF THE NAVY
ATTN: HRO-COMP OFC
PEARL HARBOR NAV. SHPYD AND IMF
667 SAFEGUARD ST STE 100
PEARL HARBOR, HI 96860

Should your compensation be reduced to zero under the provisions of 5 U.S.C. 8113(b) and 20 CFR 10.519, any deductions OWCP is making for health benefits (HB) and/or optional life insurance (OLI) will cease and coverage will be terminated. If compensation is resumed, OWCP will reinstate HB and OLI coverage and deduct any past due premiums from continuing compensation.

REQUIREMENTS FOR RESPONSE

If you wish to cooperate, please immediately contact Jamie Neal at (808) 254-3477.

If you believe you have good reason for not cooperating in this effort, advise this office in writing of your reasons, and provide evidence and argument in support of your position. You have 30 days from the date of this letter to respond. Also, if you believe that nursing services would not have reduced your wage earning capacity to zero, submit evidence to support your position.

WARNING

If you do not comply with the instructions

contained in this letter within 30 days, we will end the rehabilitation effort and reduce your compensation under the provisions of Section 8113(b) and Section 20CFR 10.519 as described above.

If you have any questions, please contact this office using the address or telephone number shown on the previous page.

Sincerely,

C. Melanie Galán
Claims Examiner

ORIGINAL
DOCKETED

FILED
MAR 28, 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES MARKHAM, and as to the third claim, on behalf of others similarly situated,	)	No. 04-15616
Plaintiff - Appellant,	)	D.C. No. CV-03-00257-SOM District of Hawaii, Honolulu
v.	)	
UNITED STATES OF AMERICA; ELAINE CHAO, as Secretary of Labor; U.S. DEPARTMENT OF LABOR; JANE DOE; JOHN DOE, 2-10; DOE	)	**ORDER**

PARTNERSHIPS 1-10;)
DOE ENTITIES 1-10;)
MELANIE GALEN;)
TWO UNKNOWN OWCP)
CLAIMS. EXAMINERS;)
TWO UNKNOWN OWCP)
NURSES,)
)
Defendant - Appellees.)
_____)

Before: HAWKINS, McKEOWN, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are denied.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Cathy A. Catterson
Clerk of Court

(415) 556-9800

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
Post Office Box 193939
San Francisco, California 94119-3939

April 5, 2006

USDC, Hawaii
District of Hawaii (Honolulu)
United States Courthouse
Honolulu, HI 96850

No. Title Agency/D.C. No.

04-15616 Markham v. USA CV-03-00257-SOM

Dear Clerk:

The following document in the above listed cause is being sent to you under cover of this letter.

- *Certified copy of the Decree of the Court*

The record on appeal will follow under separate cover. Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson
Clerk of Court

s/_____
By: Mariam Foreman
Deputy Clerk

Enclosure(s)
cc. All Counsel

UNITED STATES COURT OF APPEAI S

FOR THE NINTH CIRCUIT

JAMES MARKHAM, and as to the third claim, on behalf of others similarly situated,	) No. 04-15616)) D.C. No.) CV-03-00257-SOM
Plaintiff - Appellant,	)
v.	)
UNITED STATES OF AMERICA; et al.,	) **JUDGMENT**
Defendants - Appellees.	)

Appeal from the United States District Court for the District of Hawaii (Honolulu).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 01/17/06